No. 82-1167

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that narcotics agents violated the Fourth Amendment by conducting a more extensive warrantless search of a package than that previously conducted by private persons?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Authorities ii

Statement of the Case 1

Summary of Argument 5

Argument:

The unlimited, warrantless search of a package by federal agents, which exceeded the scope of a prior, private search of that package, violated the Fourth Amendment 7

Introduction 7

A. Opening plastic bags, extracting samples of the substance within and chemically analyzing that substance constitutes a search. 8

B. The agents violated the Fourth Amendment by conducting a warrantless search of respondents' package by opening the plastic bags, withdrawing samples of the substance and subjecting those samples to chemical analysis. 21

Conclusion 27

TABLE OF AUTHORITIES

Cases:

Arkansas v. Sanders, 442 U.S. 753 .....10, 16, 22, 25
Burdeau v. McDowell, 256 U.S. 465 25
Cardwell v. Lewiss, 417 U.S. 583 .....7, 26
Cash v. Williams, 455 F.2d 1227 21
Coolidge v. New Hampshire, 403 U.S. 443 22
Cupp v. Murphy, 412 U.S. 291 13
Davis v. Mississippi, 394 U.S. 721 13

Delaware v. Prouse, 440 U.S. 648 26
Draper v. U.S., 358 U.S. 307 13
Illinois v. Andreas, 103 S.Ct. 3319 .....9, 12, 16, 17
Illinois v. Gates, 103 S. Ct. 2317 27
Illinois v. Lafayette, 103 S. Ct. 2605 25
Ex Parte Jackson, 96 U.S. 727 .....5-6, 9
Jones v. U.S., 357 U.S. 493 22
Katz v. United States, 389 U.S. 347 .....6, 9, 11, 22
Mincey v. Arizona, 437 U.S. 385 .....16, 22
New York v. Belton, 413 U.S. 454 25
Robbins v. California, 453 U.S. 420 10
Smith v. Maryland, 442 U.S. 735 9
Terry v. Ohio, 392 U.S. 1 .....11, 26
Texas v. Brown, 103 S. Ct. 1535 .....9, 27
Torres v. Puerto Rico, 442 U.S. 465 17
Walter v. U.S., 447 U.S. 649 .....passim
Zurcher v. Stanford Daily, 436 U.S. 547 17
U.S. v. Andrews, 618 F.2d 646, cert. den. 449 U.S. 824 20
U.S. v. Barry, 673 F.2d 912, cert. den. 103 S.Ct. 238 .....9, 18, 19
U.S. v. Belle, 593 F.2d 487, cert. den. 442 U.S. 911 20
U.S. v. Bulgier, 618 F.2d 472, cert. den. 449 U.S. 843 20
U.S. v. Chadwick, 433 U.S. 1 .....6, 9, 10
U.S. v. Crabtree, 545 F.2d 884 20
U.S. v. Edwards, 602 F.2d 458 20
U.S. v. Ford, 525 F.2d 1308 20
U.S. v. Jeffers, 342 U.S. 48 22
U.S. v. Jennings, 653 F.2d 107 19
U.S. v. Johns, 707 F.2d 1093 21
U.S. v. Knotts, 103 S. Ct. 1081 9
U.S. v. Lovasco, 431 U.S. 783 27
U.S. v. Mendenhall, 446 U.S. 544 27
U.S. v. Newton, 510 F.2d 1149 21
U.S. v. Nieves, 609 F.2d 642, cert. den. 444 U.S. 1085 20
U.S. v. Place, 103 S.Ct. 2637 .....10, 11, 13

U.S. v. Ramsey, 431 U.S. 606 17
U.S. v. Rivera, 654 F.2d 1048 21
U.S. v. Rodriguez, 596 F.2d 169 20
U.S. v. Ross, 456 U.S. 798 .....10, 22, 25
U.S. v. Russell, 655 F.2d 1261, modified, 670 F.2d 323, cert. den. 457 U.S. 1108 19
U.S. v. Taheri, 648 F.2d 598 20
U.S. v. Van Leeuwen, 397 U.S. 249 9
U.S. v. Walther, 652 F.2d 788 19
U.S. v. Williams, 622 F.2d 830, cert. den. 449 U.S. 1127 20

Constitution and Statutes:

U. S. Const. Amend. I 15, 19
U. S. Const. Amend. IV .....passim

Other:

I. W. LaFave, "Search and Seizure" 12
Vol. 9, no. 2 "Drug Enforcement" 13

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The government seeks reversal of the decision of the United States Court of Appeals for the Eighth Circuit that federal drug agents' unlimited warrantless search of a package previously subjected to only a limited inspection by employees of a private carrier violated the Fourth Amendment. The federal agents' search involved opening several sealed plastic bags, extracting samples of a substance and testing its chemical composition to discover the presence of cocaine. The Court of Appeals held that

evidence derived from the agents' extension of a private search should have been suppressed and reversed Respondents' convictions of drug-related offenses.

1. On the morning of May 1, 1981, an employee of Federal Express at the airport in Minneapolis, Minnesota, brought a damaged package to his supervisor's attention. Together, pursuant to company policy, they opened the package to determine possible damage to its contents. (J.A. 40; *United States v. Jacobsen*, 683 F. 2d 296, 297 (8th Cir. 1982)).

The package was approximately ten inches long, six inches wide and six inches deep. Brown wrapping paper with an airbill affixed covered a cardboard box; within the box, newspapers covered an opaque grey duct-tape tube approximately ten inches long and two inches wide. Federal Express employees opened the cardboard box and cut the duct-tape tube. Inside this closed tube were four sealed plastic bags, one inside each other, the innermost of which contained a white powdery substance. (J.A. 15, 25, 29-30, 41).

Suspecting that this powder was an illegal drug, the employees contacted the regional security manager for Federal Express, who told them to contact the local Drug Enforcement Administration. (J.A. 42, 46, 50). The plastic bags containing the powder were rolled up and replaced in the tube, which was replaced in the box. The plastic bags were visible from the end of the tube, but the white substance itself could not be seen without entering the box again. (J.A. 42-43; 683 F.2d at 297). The package was then locked in a file cabinet in the Federal Express office. (J.A. 42).

DEA Agent James Lewis received the first contact from

Federal Express around 9:00 o'clock that morning and called Agent Jerry Kramer, who was the first agent to arrive at the Federal Express office. (J.A. 23, 32). Agent Kramer took custody of the package, pulled the plastic bags out of the duct-tape container to see what was inside the tube, unrolled and unsealed the plastic bags. (J.A. 43-44, 72). He took a knife blade, removed a small amount of the white powder inside, and conducted a three-part chemical field test of the powder, which indicated the presence of cocaine. (J.A. 72, 75).

When Agent Lewis arrived at Federal Express around 10:30 a.m., Agent Kramer showed him the positive field test results. (J.A. 23). Agent Lewis brought the package to the DEA office at the airport, reopened it and weighed the cocaine. (J.A. 33, 64, 67). Agent Lewis observed that the powder "looked like sugar that had been damp". (J.A. 70). He took a second sample for further chemical tests at the DEA laboratory. (J.A. 74). Then the package was rewrapped to appear as if it had never been opened, for the purpose of a "controlled delivery" to Respondents' address, which appeared on the airbill (J.A. 17, 28, 63).

Agent Lewis, dressed to look like a delivery man, made the "controlled delivery" of the package to Mrs. Jacobsen at approximately 2:45 p.m. (J.A. 6, 9). In the meantime, other agents obtained a search warrant. (J.A. 6, 10, 17-18, 30). An hour later, Lewis returned, claiming he had not received a proper signature for the package. When he was denied entry to the residence, forcible entry was made. (J.A. 7-9; 683 F. 2d at 298).

Execution of the search warrant resulted in the discovery of residue from the package, cocaine traces, and drug paraphernalia. (683 F. 2d at 298).

2. Respondents moved to suppress the evidence obtained pursuant to warrant on the grounds that the warrant was based upon a prior illegal warrantless search, relying in part on *Walter v. United States*, 447 U.S. 649 (1980). The Magistrate (Pet. App. 24a-25a) and the District Court (Pet. App. 15a) found *Walter* distinguishable on its facts and, without discussing whether the agents' actions constituted a "search", and if so, whether any exception to the warrant requirement applied, sustained the government's position.

3. The Court of Appeals for the Eighth Circuit reversed the ruling of the District Court, finding *Walter* controlling. (683 F. 2d at 299-300). As in *Walter*, the Court of Appeals found that Respondents had a reasonable expectation of privacy in the contents of a sealed package, which expectation was not entirely frustrated by the limited private search. The court found that private parties conducted a search of the package sufficient to draw an inference about its contents, but did not open the sealed plastic bags, remove or in any way analyze the powder, and subsequently replaced the bags in the tube. DEA agents not only seized the package, but removed the bags, opened them, extracted samples and tested previously "unidentified substances", thus exceeding the scope of the private search. (683 F. 2d at 300 n. 4). Applying the doctrine established in *Walter*, the Court of Appeals ruled that absent circumstances justifying such a failure, the agents should have obtained a warrant.

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an

> inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. 683 F. 2d at 299-300. (Fn. omitted).

Thus, "the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' Fourth Amendment rights." (683 F. 2d at 300). Since the chemical analysis identifying cocaine was "the core of the affidavit which justified the issuance of the warrant to search the Jacobsens' home," the convictive evidence discovered therefore should have been suppressed. (Ibid.). The Court of Appeals reversed Respondents' convictions on drug-related counts. The government's petition for rehearing en banc was denied. (Pet. App. 10a).

SUMMARY OF ARGUMENT

A. The opening of plastic bags, withdrawal of samples of their contents and chemical analysis of those samples constitutes a search within the meaning of the Fourth Amendment. The bags were found within a package sent by a common carrier, and as the recipients of that package Respondents had a long-established and well-recognized expectation of privacy. *Ex parte Jackson*, 96 U.S.

727, 733 (1878); *United States v. Chadwick*, 433 U.S. 1, 10 (1977). Their expectation of privacy was also one that was reasonable, as the manner of packaging established their subjective expectation of privacy, and society recognizes as reasonable a person's desire to keep the contents of containers private. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

By focusing on the nature of the "information" to be kept private and the limited nature of the information disclosed by chemical testing, the government ignores the fact that one's privacy interest is determined at the time a package is shipped, not after it has later been examined by a private party. *Walter v. United States, 447 U.S. 649,* 658-659 & n. 12 (1980). Furthermore, even though the unlimited examination of the contents of the package may have been less instrusive than other types of searches, this Court recognizes no exception providing for warrantless searches where the physical entry is "minor" or where that which can be discovered as a result of the entry is limited.

The narrow holding of the Court of Appeals that a warrant was required under the limited circumstances of this case is based upon well-established constitutional doctrine, is required by this Court's decision in *Walter v. United States, supra,* provides a workable and intelligible standard for application by police officers and imposes no excessive burden on law enforcement.

B. Having established that the actions of the government agents constituted a search, it must be determined whether that search came within one of the recognized exceptions to the warrant requirement. Instead of treating the issue as involving the permissible scope of an official search after a private search, however, the government

treats the actions of the agents on an individual basis, calling the separate activities "seizures" instead of recognizing that they constitute a search.

Because of the physical entry involved in opening the plastic bags, removing samples and testing the substance, it is clear that these actions constitute a search. See *Cardwell v. Lewis*, 417 U.S. 583, 591-592 (1974). Therefore, this Court's rules regarding warrantless seizures of items upon reasonable suspicion, on probable cause or because they are in plain view are not applicable.

The government nowhere claims that the actions of the agents did not exceed the scope of the prior, private search. Because those actions, involving physical entry of the package and its contents, clearly constituted a search and the agents did not obtain a warrant, the Court of Appeals correctly applied *Walter v. United States, supra*, in determining that the search was unlawful.

ARGUMENT

THE UNLIMITED, WARRANTLESS SEARCH OF A PACKAGE BY FEDERAL AGENTS, WHICH EXCEEDED THE SCOPE OF A PRIOR, PRIVATE SEARCH OF THAT PACKAGE, VIOLATED THE FOURTH AMENDMENT.

INTRODUCTION

The Court of Appeals properly applied the doctrine clarified by this Court in *Walter v. United States*, 447 U.S. 649 (1980) in determining that federal narcotics agents had unlawfully searched the package addressed to Respondents' residence. The use of chemical field-testing is not at issue in this case; rather, it is whether government agents can extend the scope of a private search of a pack-

age without obtaining a warrant, where neither exigency nor any other exception to the warrant requirement of the Fourth Amendment applies.

In section A, we demonstrate that the DEA agents did conduct a search within the purview of the Fourth Amendment when they opened the plastic bags, extracted samples and subjected them to chemical tests, thus exceeding the scope of the prior private search. In section B, we explain that this search, conducted without a warrant, was unlawful.

A. OPENING PLASTIC BAGS, EXTRACTING SAMPLES OF THE SUBSTANCE WITHIN AND CHEMICALLY ANALYZING THAT SUBSTANCE CONSTITUTES A SEARCH.

1. Respondents clearly had a privacy interest protected by the Fourth Amendment in the sealed package that was sent via Federal Express. This Court has long recognized that:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.

Ex parte Jackson, 96 U.S. 727, 733 (1878). Accord *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970); *United States v. Chadwick*, 433 U.S. 1, 10 (1977); *Walter v. United States, supra*, 447 U.S. at 654-55 n. 5.

Even absent such controlling authority, it is clear that Respondents were entitled to the protection of the Fourth Amendment for the package, as they "exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation (was) one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Knotts*, —— U.S. ——, 103 S.Ct. 1081, 1085 (1983). See also *Walter v. United States, supra*, 447 U.S. at 658-659 n. 12; *Texas v. Brown*, —— U.S. ——, 103 S.Ct. 1535, 1542 (1983); *Illinois v. Andreas*, —— U.S. ——, 103 S.Ct. 3319, 3323 (1983).

The absence of labeling on the package, its multi-layered contents and sealed duct-tape tube establish that Respondents took virtually every precaution possible to prevent discovery of the contents of the package. Compare *United States v. Barry*, 673 F. 2d 912, 919 (6th Cir.), cert. den. —— U.S. ——, 103 S.Ct. 238 (1982). It is clear, therefore, that Respondents wished to keep the contents of the package private, as the government repeatedly recognizes. (Pet. Br. at 7, 14, 15, 16 n.8). Equally important is that their privacy interest is determined at the time the package was shipped; therefore, it was not defeated by the fortuitous opening of the package by Federal Express. *Walter v. United States, supra*, 447 U.S. at 658-659 & n. 12.

2a. The fact that the DEA agents were lawfully in

possession of the package did not give them authority to search its contents. An individual's possessory and privacy interests in a sealed package are distinct. Even where government interests in preventing loss or destruction of suspected contraband justify possession of a package, privacy interests in its contents require the government to obtain a warrant authorizing the search of such a closed container. *United States v. Chadwick, supra,* 433 U.S. at 13; *Arkansas v. Sanders,* 442 U.S. 753, 762 (1979); *Robbins v. California,* 453 U.S. 420, 426 (1981); *United States v. Place,* —— U.S. ——, 103 S.Ct. 2637, 2644 (1983).[1] As Chief Justice Burger explained in *Chadwick,*

> Respondents' principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. *Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.* 433 U.S. at 13-14 n. 8. (Emphasis supplied).

The privacy interest maintained by Respondents here—not only in the contents of the package but additionally in the (illegal) nature of the substance that package contained—is directly analagous to that in any other closed container.

The government seemingly ignores these authorities, focusing instead upon the nature of the information desired

[1]This rule is not affected by the holding in *U.S. v. Ross,* 456 U.S. 798, 824 (1982). *United States v. Place,* — U.S. —, 103 S.Ct. 2637, 2641 n. 3 (1983).

to be kept secret, described as the "molecular structure" of the substance contained within the package. (Pet. Br. at 11). Although recognizing that Respondents understandably *did* expect to keep the nature of the substance private, it is argued that because a chemical analysis will "rarely, if ever, interfere with any interest protected by the Fourth Amendment" and is not "remotely as intrusive as a search of a person's papers or effects" (Pet. Br. at 11, 12), it should not be deemed a search subject to the Fourth Amendment.

The constitutional underpinning for this argument is difficult to discern, as this Court has never recognized that "minor" searches are not subject to the Fourth Amendment but "major" searches are.[9]

Not only is there no prior support for such a *de minimus* rule regarding unlawful searches; to accept such a doctrine would surely render meaningless the protection for "effects" which the specific language of the Fourth Amendment provides, and be directly at odds with the fact that that Amendment "protects people, not places." *Katz v. United States, supra,* 389 U.S. at 351. Further, acceptance of such a doctrine would make it difficult, if not impossible, to establish an identifiable and workable standard

[9]We recognize that such a distinction has been recognized for "minor seizures"—those allowed for limited purposes on less than probable cause. *Terry v. Ohio,* 392 U.S. 1, 30 (1968); *United States v. Place, supra* n.1, 103 S.Ct. at 2644. This distinction is explained by the functional physical difference between a "seizure" (a taking) and a "search" (an entry).

by which police conduct could be judged,[3] and the necessary *post hoc* judgments to determine "how illegal" a particular search was would be necessarily arbitrary. Therefore, without any legal or logical support, the theory should be rejected.

2b. The government's related contention is that because the field test reveals only whether the substance is or is not cocaine, and nothing else about its composition,[4] it is therefore not a search; perforce the Fourth Amendment does not apply. (Pet. Br. at 14-15.) In other words, because the test could reveal only information about unlawful activity, and no information about lawful activity, no "legitimate private interest" (Pet. Br. at 15) was infringed.

Not surprisingly, no authority is cited for this proposition, for there is none. *Illinois v. Andreas, supra,* 103 S.Ct. at 3325 (Brennan, J., dissenting) ("We have, to my knowledge, never held that the physical opening and examination of a container in the possession of an in-

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[3]It is worth noting that the government does not indicate whether an initial negative chemical analysis would permit its agents to extend the scope of the search by a more sophisticated analysis.

Caution should be exercised in denying that government practices constitute a search.

> To say that a particular type of police practice is not a search is to conclude, in effect, that such activities "may be as unreasonable as the police please to make them," and thus the push must be in the direction of applying the "search" appellation to those varieties of police conduct which we are not prepared to leave totally uncontrolled.

I. W. La Fave, "Search and Seizure", §2.2 at 267 (1978).

[4]As the government notes (Pet. Br. at 14 & n. 7) this fact was not developed below but is based upon information from the DEA.

At our request, the government has provided us with the basis for this assertion, which indicates that the test in question is specific for cocaine in comparison with eighteen other substances of similar appearance.

dividual was anything other than a 'search'.").[4] If the government's assertion were correct, neither this Court nor any other would have much occasion to examine the meaning of the Fourth Amendment.[5]

More important, it is not true that no rights of the innocent can be infringed by warrantless searches such as occurred in this case. Although somewhat unlikely, it is certainly possible for an innocent person—whether by reason of mental deficiency, paranoia, eccentricity or any other reason—to be shipping lawful substances such as sugar, talcum powder or baking soda via contract carrier.[6] Although the severity of intrusion by chemical analysis may not be as high as other intrusions, it still constitutes an entry into personal effects—something desired to be kept private, something maintained as secret—and is no less a violation of the security of one's possessions than opening a suitcase, a box marked "Fragile", a purse or any other repository of personal effects.

United States v. Place, supra, also supports the conclusion that the withdrawal and analysis of the substance here constituted a search. The primary issue in *Place* was the permissibility and scope of a limited detention of luggage on reasonable suspicion that it contained narcotics. There, DEA agents detained the defendant's bags on

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[4]Interestingly, the government cites *Cupp v. Murphy*, 412 U.S. 291 (1973) in support of its contention that the chemical analysis here was not a search because it did not intrude upon "cherished personal security". (Pet. Br. at 15). *Cupp v. Murphy* also held that the taking of fingernail scrapings was a search, 412 U.S. at 295, a process which is certainly at least the functional equivalent of taking samples of a substance and subjecting them to chemical analysis. See also *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

[5]As Justice Douglas so cogently observed, Fourth Amendment rights are difficult to protect because "their advocates are usually criminals." *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting).

[6]Cf. Vol. 9, no. 2 "Drug Enforcement" at 12 (U.S. Department of Justice, Fall, 1982) which cautions federal agents about the sending of cocaine substitutes which contain no controlled substance through the mail.

such a basis and subjected them to a "sniff test" by a trained narcotics detection dog, which led to issuance of a search warrant.

In approving this type of seizure, the Court concluded that the "sniff test" did not constitute a search.

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage.* It does not expose noncontraband items that otherwise would remain hidden from public view as does for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. *In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.* Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment. 103 S. Ct. at 2644-2645. (Emphasis supplied; citation omitted.)

Consideration of the relevant factors here leads to the conclusion that a search was involved:

1. Withdrawal of the sample and its testing *did require* complete entry of the package;

2. Everything in the package *was* exposed to the public view; and

3. The procedure here is more intrusive because it involved physical entry of the package and its contents.

The conclusion that the agents' actions here constituted a search is also mandated by *Walter v. United States, supra*, contrary to the government's contention. (Pet. Br. at 16-17.) It is perhaps true that pornographic films disclose more "information" than does a chemical analysis, but the Fourth Amendment does not protect only "information" within the purview of the First Amendment; its primary protection is the security ("to be secure") of people themselves and in their possessions ("houses, papers and effects").

Thus, the "search of the contents of the films" in *Walter*, 447 U.S. at 654, equates to the extraction and chemical analysis of the contents of the package here. The contents of both containers was apparent (by description or appearance); agents in both cases were attempting to determine whether the owner/recipient was guilty of a crime; and there was probable cause to believe the contents were contraband. Neither procedure could be called anything but a search, and the fact that the materials in *Walter* were arguably protected by the First Amendment required only that the warrant requirement be "scrupulously observed", 447 U.S. at 655 & n.6; it was not determinative of the result.

3. The government's final reason for maintaining that the actions of the agents did not constitute a search involves the "extraordinary burdens" which would result to narcotics enforcement if search warrants were required under situations such as that here. (Pet. Br. at 17-18.)

Law enforcement efficiency, of course, is not a sufficient reason to sacrifice the protection of the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *Arkansas v. Sanders, supra*, 442 U.S. at 758. Furthermore, the government's position is demonstrably incorrect.

First, there is no language in the Court of Appeals' opinion supporting the proposition that it "would apparently rule" (Pet. Br. at 18) that every chemical analysis is a search. The opinion makes clear that the only issue is whether the search by the agents exceeded the scope of the search by Federal Express; that is the basis of the holding below. 683 F. 2d at 299, 300.

Second, it is clear that not all field tests or other chemical analyses could reasonably be argued to require a warrant, as several examples show. After a hand-to-hand buy, the seller has relinquished possession, control and ownership of his drugs, and thus his expectation of privacy. After execution of a valid search warrant and seizure of items authorized by that warrant, the testing of substances seized clearly falls within the scope of the warrant. A person who gives consent to examine his belongings which contain illegal substances waives his expectation of privacy and, absent qualification, gives unlimited right to search. Drugs which are seized incident to a lawful arrest may be tested because the fact of arrest subsumes the individual's expectation of privacy. In none of these several instances, and others, is a warrant required; nothing in the Court of Appeals' opinion suggests the contrary.

In this connection, it is appropriate to mention *Illinois v. Andreas, supra*, which held that once the police have lawfully opened a container and identified its contents as being illegal, a subsequent re-opening of the con-

tainer is not a search, absent a substantial likelihood that the contents have been changed. 103 S.Ct. at 3324-3325. The Court reasoned that once the container was *lawfully searched*, the expectation of privacy was lost; "(n)o protected privacy interest remains. . ." 103 S.Ct. at 3323. *Andreas* is instructive in its recognition that examination of the container—opening it and chemically testing its contents—did constitute a search, lawful because of the "border search" exception. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *Torres v. Puerto Rico*, 442 U.S. 465, 472-473 (1979).

Thus the government's extravagant reading of the decision below and resulting illogical reasoning suggest absurd results (Pet. Br. at 18)—results far removed from reason and the decision of the Court of Appeals. Therefore, the conclusion that "thousands of additional warrants" (ibid.) will be required each year is simply incorrect. Warrants will be required only where private carriers conducted limited searches of packages without government instigation and government agents wish to exceed the scope of those searches. Although speculative, the paucity of cases on the issue suggest that the problem is not significantly recurrent.[4] Finally, as the facts of this case nicely demonstrate, search warrants are not difficult to obtain. By the time the agents here had re-wrapped the package at the airport and driven to Respondents' residence, a search warrant had already been procured by another agent. (J.A. 10, 17-18, 30.) Requiring warrants under the narrow factual setting here would surely not

[4]Cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978): "(R)eality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it."

result in any "massive burden" (Pet. Br. at 18) on law enforcement, if indeed any burden at all.

Finally, the government lists a series of cases in which "every other court of appeals has rejected, either expressly or by implication, the view that a chemical analysis requires a warrant." (Pet. Br. at 19.) A brief review of those cases shows that most did not reach the issue of the permissible scope of government searches after private searches and therefore do not bear on the decision here.

United States v. Barry, supra, is the only federal authority we have found in direct conflict with the decision here, although it is also in conflict with this Court's decision in *Walter.* In *Barry,* a damaged package was examined by Federal Express employees, who opened and discovered it to contain four large bottles of methaqualone pills. Because of the large number of pills and effacement of the pharmaceutical numbers, the DEA was notified. Agents removed five pills for testing, and then returned the package to Federal Express. The defendant was arrested when he picked up the package.

The Court of Appeals held that the search (removing the pills for testing) could not be justified by the "plain view" exception to the warrant requirement because two essential elements—exigency and inadvertency—were not present. 673 F.2d at 918. However, the court found that there was no Fourth Amendment violation because Barry had no legitimate expectation of privacy in the contraband at the time of seizure.

> Barry and his supplier . . . could have taken greater precautions to disguise the shipment. They chose not to. Instead, they shipped a large quantity of pills in clear bottles which were plainly labeled Metha-

> qualone. In addition, the prescription numbers on the labels had been effaced. In light of Barry's failure to take precautions to protect his privacy interest from the risk of exposure inherent in his bailment, we find that he had no reasonable expectation of privacy in his drug parcel. 673 F.2d at 919.

One's interest in privacy, of course, is in the contents of a package, as clearly established above. In any event, the case is factually distinguishable, as the cocaine here was contained within four plastic bags, enclosed in duct tape, covered by newspaper and contained within a box which was originally wrapped. The same was not true for the methaqualone.

Barry also found *Walter* distinguishable, stating that

> *Walter* turned on the fact that the material seized was protected by the First Amendment. The chemical testing of Barry's pills was simply not an investigation on the scale required in *Walter* to adjudge the obscenity of the films. It was at most routine. 673 F.2d at 920.

As we observed above, *supra*, p. 15, we disagree with the Sixth Circuit's analysis of *Walter* and submit that any First Amendment considerations existent there were not determinative of this Court's decision.

See also *United States v. Russell*, 655 F. 2d 1261 (D.C. Cir. 1981), modified on other grounds 670 F. 2d 323, cert. den. 457 U.S. 1108 (1982) (warrantless search justified by automobile exception; field test not discussed); *United States v. Jennings*, 653 F. 2d 107 (4th Cir. 1981) (private versus government search; field-testing issue not raised; *Walter* not cited); *United States v. Walther*, 652 F. 2d 788

(9th Cir. 1981) (warrantless search by airline violated Fourth Amendment due to government involvement; cocaine-sampling issue not reached); *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980) (en banc), cert. den. 449 U.S. 1127 (1981) (validity of arrest and search incident to arrest; field test mentioned only in search warrant affidavit for luggage); *United States v. Andrews*, 618 F. 2d 646 (10th Cir.), cert. den. 449 U.S. 824 (1980) (private versus government search; *Walter* not cited); *United States v. Bulgier*, 618 F. 2d 472 (7th Cir.), cert. den. 449 U.S. 843 (1980) (private versus government search; field-testing issue not raised; *Walter* not cited); *United States v. Nieves*, 609 F. 2d 642 (2nd Cir. 1979) cert. den. 444 U.S. 1085 (1980) (search justified by border search exception; field test issue not reached); *United States v. Edwards*, 602 F. 2d 458 (1st Cir. 1979) (private versus government search; pre-*Walter* decision); *United States v. Rodriguez*, 596 F. 2d 169 (6th Cir. 1979) (plain view; pre-*Walter* decision); *United States v. Belle*, 593 F. 2d 487 (3d Cir.) (en banc), cert. den. 442 U.S. 911 (1979) (validity of arrest and plain view seizure; field-testing issue not raised); *United States v. Crabtree*, 545 F. 2d 884 (4th Cir. 1976) (private versus government search). *United States v. Ford*, 525 F. 2d 1308 (10th Cir. 1975) (private versus government search).

It is also worth noting that the Eighth Circuit does not stand alone in requiring that warrants be obtained before samples are removed and testing conducted on substances located within a container. In *United States v. Taheri*, 648 F.2d 598 (9th Cir. 1981) a DEA agent handled a package which had been damaged in the mail, observing folded paper bindles when the top opened. His removal of a bindle and testing of the brown paper which fell out

without a warrant was held to be unlawful, the court noting that "the government does not seriously dispute the illegality of that search of the package and seizure of the sample." 648 F.2d at 599. In *United States v. Rivera*, 654 F.2d 1048, 1056 (5th Cir. 1981) and *United States v. Johns*, 707 F.2d 1093, 1099 (9th Cir. 1983) the Fifth and Ninth Circuits held that seizure of bags and bales of marijuana from vehicles on probable cause that they contained contraband was lawful, but the sampling and chemical testing of their contents to confirm the presence of the drug required a warrant. In *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972), a search by a government agent to confirm that a paper bag held marijuana, after a private person had opened the bag and found a substance he suspected but was unable to identify as marijuana, was held unlawful. The Sixth Circuit reasoned that the private party should be characterized not as if he had handed over evidence, but as an informer; a warrant was therefore required to complete the search for illicit drugs. 455 F.2d at 1230. See also *United States v. Newton*, 510 F. 2d 1149, 1153 (7th Cir. 1975) (field-testing turns private search into government search).

B. THE AGENTS VIOLATED THE FOURTH AMENDMENT BY CONDUCTING A WARRANTLESS SEARCH OF RESPONDENTS' PACKAGE BY OPENING THE PLASTIC BAGS, WITHDRAWING SAMPLES OF THE SUBSTANCE AND SUBJECTING THOSE SAMPLES TO CHEMICAL ANALYSIS.

We have established that Respondents had an expectation of privacy in the package, and therefore the actions of the agents in opening the plastic bags, withdrawing samples and field-testing the substance found within con-

stituted a search. This search can be sustained only if it is within one of the well-recognized exceptions to the requirements that searches be conducted with warrants. "(S)earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States, supra,* 389 U.S. at 357 (ffn. omitted); *Mincey v. Arizona, supra,* 437 U.S. at 390; *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 2172 (1982). The exceptions to the warrant requirement are "jealously and carefully drawn", *Jones v. United States,* 357 U.S. 493, 499 (1958) and "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers,* 342 U.S. 48, 51 (1951). Accord *Arkansas v. Sanders, supra,* 442 U.S. at 759-760; *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971).

The government apparently ignores these authorities, and disregards that which has been Respondents' position throughout: the government agents exceeded the scope of the prior, private search by opening the plastic bags, removing samples and performing chemical analysis of the contents. Under *Walter v. United States,* their actions were illegal and therefore the Court of Appeals' decision is correct.[9]

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[9]Contrary to the government's interpretation of what Respondents "suggest" (Pet. Br. at 20), these actions, additional to those performed by Federal Express, should be considered collectively. This is clearly the basis for the Court of Appeals' decision:

> (W)e hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. 683 F. 2d at 300. (Fn. omitted).
>
> • • •
>
> We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' fourth amendment rights. Ibid.

In *Walter v. United States*, a private carrier delivered twelve, large, sealed packages containing 871 boxes of film to the wrong company. Employees of that company opened the boxes, discovered that they had suggestive drawings on one side and explicit descriptions of the sexual contents on the other, and one employee attempted, unsuccessfully, to view the films by holding them up to the light. The FBI was then contacted, lawfully acquired possession of the boxes of film, and viewed the films with a projector, without obtaining a warrant. The defendants were tried and convicted of obscenity charges after a motion to suppress was denied; a plurality of this Court reversed, finding that

> the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. 447 U.S. at 654.

The Court explained that merely because the FBI lawfully obtained possession of the boxes, it did not necessarily follow that they were given authority to search the contents, since "an officer's authority to possess a package is distinct from his authority to examine its contents." Ibid. (Fn. omitted).

Finally, the Court found unpersuasive the fact that the employees of the private business concern had searched the boxes before the Government instituted any search.

> Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse

> the failure to obtain a search warrant. . . . In this case there was nothing wrongful about the government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause. 447 U.S. at 656."

In other words, a private search does not insulate a official search from the requirements of the Fourth Amendment, whether the latter is deemed an "expansion" of the private search or an "independent search" supported by its own probable cause.

For constitutional purposes, the conduct of the narcotics agents here is indistinguishable from that of the FBI agents in *Walter:* there was a private search of the contents of the package; the agents obtained custody of the package lawfully; but once the agents obtained possession of the package, they executed an unlimited official search, which went beyond the scope of the private search. Since the government nowhere contends that the agents'

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[15]Justice White amplified on this reasoning in his concurring opinion, recognizing that whatever the extent of the prior, private search, the warrant requirement is not obviated. 447 U.S. at 662. (White, J., concurring).

actions were not an expansion of the private search, *Walter* squarely controls.

The government next[11] admits that opening a transparent container to remove a sample *is* a search; they contend that no warrant was required because the bags were transparent. (Pet. Br. at 23.) At the risk of repetition, this case involves the interest of privacy in a package and the permissible scope of a search of that package; therefore the appearance of the plastic bags themselves is not relevant.

In addition, the dicta which the government cites from *Arkansas v. Sanders* refers to containers and packages "found by police during the course of a search. . ." 442 U.S. at 764 n. 13. The agents here were present to search the container itself; thus, this is not the case where justification for a "container search" is provided by a basis for police action (such as a search) independent of the container itself. See *New York v. Belton*, 453 U.S. 454, 460 (1981) (lawful custodial arrest of automobile driver); *United States v. Ross, supra*, 102 S.Ct. at 2170-2171 (automobile search); *Illinois v. Lafayette*, —— U.S. ——, 103 S.Ct. 2605, 2611 (1983) (stationhouse inventory search after lawful arrest).

Next, and further fragmenting the extended search, the government appears to maintain that the plain view doctrine justified the removal, on two occasions, of samples of the substance for testing. By calling the removal and testing of samples "seizures" (Pet. Br. at 24, 25, 26), the

[11]Much verbiage is devoted to what Respondents *do not* dispute nor contend (Pet Br. at 20-22); it is primarily correct and therefore will not be discussed at length here. No "private search" question is presented, *Burdeau v. McDowell*, 252 U.S. 465, 475 (1921), and we do not maintain that it is relevant whether the plastic bags were in plain view when the DEA agents arrived.

government seeks application of a "minimal intrusion" doctrine of Fourth Amendment jurisprudence[11] and argues once again that this process was not a search. (Pet. Br. at 24.)

Respondents have stated repeatedly that the issue here involves the search of the package and that the extended actions by the agents can only be considered as a whole. Despite the fact that only a small amount of substance is involved, its removal and testing is still clearly a search; without such procedures the agents would not have known whether it was really "damp sugar". (J.A. 70). Compare *Cardwell v. Lewis*, 417 U.S. 583, 591-592 (1974) (examination of tire and taking of paint scrapings is a search; automobile exception).

Finally, it is disingenuous at best to suggest that a package which agents have taken from private parties has not *already* been seized, but that complete examination of that package—including chemical testing of its contents—is somehow just *another* seizure. Such a suggestion makes neither practical nor forensic sense.

The government's final argument is that the Fourth Amendment permits "*seizures* upon probable cause without a warrant." (Pet. Br. at 25) (Emphasis supplied). Respondents do not contend otherwise and have never challenged the agents' seizure of the package by taking it into custody. However, as clearly established above, it is the *search* of this package which this case involves, and the plain view doctrine simply has no applicability: the seizure is not contested; there is no prior independent justification for police presence; and there is no inadvertence,

[11]See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (street detention); *Delaware v. Prouse*, 440 U.S. 648 (1979) (auto stop).

as the agents expected to find a package containing contraband when they arrived. See *Texas v. Brown, supra,* 103 S.Ct. at 1540 & n. 4."

CONCLUSION

Respondents respectfully submit that the Court of Appeals has not erred in its application of fundamental Fourth Amendment law, and its decision should be affirmed.

Respectfully submitted,

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"In a final footnote, the government discusses the Court of Appeals' finding that without the chemical analysis of the substance in the package, probable cause for the search of Respondents' residence could not be established. It is suggested that even without the evidence obtained by the challenged search by the agents, probable cause existed. This argument, raised for the first time in this Court, should not be considered. *United States v. Lovasco,* 431 U.S. 783, 788 n. 7 and cases cited (1977); *United States v. Mendenhall,* 446 U.S. 544, 551 n. 5 and cases cited (1980). Cf. *Illinois v. Gates,* — U.S. —, 103 S. Ct. 2317, 2321-2325 (1983).